Midwest Psychological Center, Inc. *and* Yaina Williams *and* Hyun Kim. Cases 25–CA–29381 and 25–CA–29405

December 9, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 19, 2005, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Midwest Psychological Center, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 9, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Belinda J. Brown, Esq., for the General Counsel.
William M. Hawkins, Esq., of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 20 and 21, 2005.[1] The

[1] The Respondent has excepted to the judge's finding that it is an employer subject to the Board's jurisdiction. The Respondent admits in its answer that it is an Indiana corporation with an office and a place of business located in Indianapolis, Indiana, and that it has been engaged in the business of providing mental health and social services to inmates at correctional facilities. The Respondent (a health care institution) also admits that, during the 12 months preceding issuance of the complaint, it derived gross revenues in excess of $250,000 in the conduct of its business operations and that it provided services in excess of $5000 to Corrections Corporation of America, a firm whose operations satisfy the Board's jurisdictional standards. The evidence further establishes that, during the 12 months preceding the hearing, the Respondent furnished services valued in excess of $50,000 to Corrections Corporation of America. In its exceptions, the Respondent contends that the Board's jurisdiction must be established prior to the date that the unfair labor practice charges were filed by the discriminatees and that the evidence fails to establish such jurisdiction as of that date. There is no requirement that jurisdiction be established as of a date prior to the filing of the charges. As the Board has stated, "its jurisdictional criteria . . . do not literally require evidentiary data respecting any certain 12-month period. . . ." See *J & S Drywall*, 303 NLRB 24, 29 (1991), enf. denied on other grounds sub nom. *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992). Based on the evidence and admissions of jurisdictional facts by the Respondent, we find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and a health care institution within the meaning of Sec. 2(14) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. We do not, however, rely upon the judge's finding that witnesses called by the Respondent lied under oath.

Chairman Battista notes that, at the hearing, the judge denied the Respondent's motion for a continuance because of a death in the family of the Respondent's president. The Respondent did not specifically except to the judge's denial of its motion and, therefore, the judge's decision to deny that motion is not before the Board. The Respondent's exception asserts only that the judge's denial of its motion is evidence of the judge's bias. Chairman Battista agrees that the Respondent's contention concerning bias is without merit.

The Respondent's allegation that the judge was biased was based in part on his questioning of the Respondent's witnesses. Chairman Battista notes that it is the duty of the judge to inquire fully into the facts and that the judge has the authority to call, examine, and cross-examine witnesses. See Sec. 102.35 of the Board's Rules. The judge, however, may not do anything which gives the appearance of partiality. Thus, the judge may not take over the role of prosecutor, which is the General Counsel's function in unfair labor practice proceedings. *Teamsters Local 722 (Kasper Trucking)*, 314 NLRB 1016, 1017 (1994), enfd. 57 F.3d 1073 (7th Cir. 1995). While the judge here on occasion engaged in extensive questioning of witnesses, viewing the proceedings as a whole, his questioning did not give the appearance of partiality or constitute an attempt to take over the General Counsel's prosecutorial role. Thus, Chairman Battista agrees that the Respondent's contention is without merit.

[1] Counsel for General Counsel's motion for separation of the witnesses was granted. Counsel for Respondent requested that he be allowed to have both Shelvy Keglar, the president and part owner of the Respondent, and Kellee Blanchard, Respondent's program coordinator,

charge in Case 25–CA–29381 was filed by Yaina Williams against Midwest Psychological Center, Inc. (Respondent or Midwest) on October 26, 2004.[2] The charge in Case 25–CA–29405 was filed by Hyun (Adrian) Kim against Respondent on November 26. The complaint was issued on January 27, 2005, alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act), by discharging Williams and Kim because they concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by requesting that employees be paid for attending mandatory meetings and that employees be compensated for actual hours worked. Respondent denies violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent , I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business on Washington Boulevard in Indianapolis, Indiana, has been engaged in the provision of mental health and social services. In its answer to the complaint Respondent admitted that during the past 12 months, in conducting its business operations, it derived gross revenues in excess of $250,000, and it provided services valued in excess of $5000 for Corrections Corporation of America (CCA). Respondent never amended this portion of its answer. Also, in its answer to the complaint, Respondent alleges that it is without sufficient knowledge to admit or deny (1) that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act, (2) that at all material times CCA, a corporation, with a main office in the State of Tennessee, has been engaged in the management of the Marion County Jail II corrections facility in Indianapolis, Indiana, and (3) during the past 12 months CCA in the course of conducting its business operations, has provided services valued in excess of $50,000 in states other than the State of Tennessee. (Par. 2(e) of the complaint.) At the outset of the trial herein counsel for General Counsel was allowed to amend paragraph 2(e) of the complaint, over the objection of Respondent, to allege that during the past 12 months CCA, in conducting its business operations, has purchased and received, at its Indianapolis, Indiana facility, goods valued in excess of $50,000 directly from points outside the State of Indiana.

Karen McConnell, who is the business manager of CCA at its Indianapolis correctional facility, testified that she makes sure that all of the invoices which come for CCA at Marion County Jail II in Indianapolis are coded for budgetary purposed, and sent to CCA's corporate office in Nashville, Tennessee; that CCA's correctional facility in Indianapolis takes the overflow of inmates from Marion County, Indiana; that Respondent supplies the mental health services for CCA's Indianapolis facility; that in the course of managing the Marion County Jail II, CCA purchases goods such as inmate clothing, hygiene items, and law enforcement equipment, among other things; that goods come from outside of Indiana; that General Counsel's Exhibit 2 includes an invoice, with a due date of "01/26/2005," she received at CCA Marion County Jail II from Bob Barker Company, Inc., which is located in North Carolina, for inmate clothing and hygiene items for $3,046.36 which were received at CCA's Marin County Jail II; that the last page of General Counsel's Exhibit 2 is a copy of the CCA check that was used to pay for the goods covered in the above-described January 26, 2005 invoice,[3] that General Counsel's Exhibit 3 includes an invoice, with a due date of "02/08/2005," she received at CCA Marion County Jail II from Bob Barker Company, Inc. in North Carolina, for inmate clothing and hygiene items for $2,945.71 which were shipped to CCA's Marin County Jail II,[4] that the last page of General Counsel's Exhibit 3 is a copy of the CCA check that was used to pay for the goods covered in the above-described February 28, 2005 invoice; that General Counsel's Exhibit 4 includes an invoice, with a due date of "03/14/2005," she received at CCA Marion County Jail II from Bob Barker Company, Inc. in North Carolina, for inmate clothing and hygiene items for $4,289.48 which were received at CCA's Marin County Jail II,[5] that the last page of General Counsel's Exhibit 4 is a copy of the CCA check that was used to pay for the goods covered in the above-described March 14, 2005 invoice; that General Counsel's Exhibits 5, 6, and 7 are invoices from RJ Young Company in Nashville, Tennessee for copiers that CCA purchased and received at its Marion County Jail II facility in Indianapolis, with each invoice totaling $11,914.70;[6] that she receives and keeps a copy of the involved invoices (The original is forwarded by her to CCA's corporate office after she codes it.), and CCA's corporate office sent her the copies of the checks and the list of the invoices included in the payment; that if CCA's corporate office did not pay the invoices, she would have received a past due invoice and this did not occur with any of the involved invoices;[7] that

remain at counsel's table throughout the trial. Counsel for General Counsel objected and Respondent had Shelvy Keglar at counsel's table throughout the trial.

[2] All dates are in 2004 unless otherwise indicated.

[3] Respondent's attorney objected to receiving this exhibit in evidence arguing "I object . . . to these invoices . . . [to] the Company she works for. . . . It has nothing to do with us whatsoever. We are an independent contractor. We did not pay one penny for it." (Tr. p. 17.) Respondent's objection was overruled and the exhibit was received.

[4] General Counsel's Exhibit 3 also includes an invoice with a due date of "02/10/2005" for $405 for inmate uniforms.

[5] General Counsel's Exhibit 4 also includes an invoice with a due date of "03/16/2005" for $15,764.30 for inmate clothing and blankets purchased from Bob Barker in North Carolina and shipped to CCA in Indianapolis.

[6] General Counsel's Exhibit 5 has an invoice date of "10/26/04," General Counsel's Exhibit 6 has an invoice date of "01/21/05," and General Counsel's Exhibit 7 has an invoice date of "02/23/05," the last page of each of these three exhibits has a copy of a check which, according to other pages in the exhibits, pays for these charges. The other pages of these exhibits list the invoice number, the invoice date, and the invoice amount that is being paid, along with other invoices, by the check.

[7] Respondent's attorney argued that McConnell was not the "keeper of the records" with respect to the checks and the list of invoices which

General Counsel's Exhibits 8, 9, 10, and 11 are invoices from Respondent to CCA for mental health services provided to inmates housed at Marion County Jail II dated October 1, December 1, February 1, 2005, and March 1, 2005, respectively, and copies of the checks for the payments of $24,753.09,[8] $20,595.42,[9] $13,113.24 (dated "04/08/05"), and $12,396.07 (dated "05/27/05"), respectively, from CCA to Respondent; and that she receives and codes the above-described invoices from Respondent to CCA.[10]

When called by the Respondent, Shelvy Keglar gave the following testimony in response to questions of Respondent's attorney:

> Q. Did you do $250,000.00 worth of business in the year of 2004 with this Contract [with CCA] you had?
>
> A. No.
>
> Q. Did you make any purchase during that period of time?
>
> A. No. [Tr. p. 409.]

On cross-examination by counsel for General Counsel, Shelvy Keglar testified that CCA is not the only company with which Midwest has a contract to provide mental health services in Indiana; that Midwest also has a contract with Correctional Medical Services (CMS) of St. Louis; that the contract with CMS has been in effect since September 2004, and it was still in effect when he testified at the trial herein; that Respondent bills $50,000 to $60,000 a month on that contract; and that in the 12 months before he testified at the trial herein Midwest received more than $250,000 total from its contracts with CCA and CMS.

The evidence of record demonstrates that (a) at all material times CCA, a corporation with a main office in Tennessee, has been engaged in the management of the Marion County Jail II correction facility in Indianapolis, (b) during the pertinent 12-month period CCA, in the course of conducting its business operations, purchased and received, at its Indianapolis facility, goods valued in excess of $50,000 directly from points outside the State of Indiana, (c) during the pertinent 12-month period Respondent, in conducting its business operations derived gross revenues in excess of $250,000, and (d) during the pertinent 12-month period Respondent, in conducting its business operations, provided services valued in excess of $5000 for CCA. In *C. P. Associates, Inc.*, 336 NLRB 167, 167 (2001), the Board indicated

> As the Board recently reiterated, an admission is in effect a confessory pleading, and it is conclusive upon the party making it. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000) (quoting *Academy of Art College*, 241 NLRB 454, 455 (1979) enfd. 620 F.2d 720 (9th Cir. 1980). The administrative law judges, the Board, and the parties rely on the complaints and the answers to determine contested issues. Id. Nor do we find that the introduction of potentially conflicting evidence negates the binding effect of the admission. Both the Board and the courts have held that admissions contained in pleadings are binding even where the admitting party later produces contrary evidence. Id.

Section 102.23 of the Board's Rules and Regulations provides that

> The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the administrative law judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the administrative law judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board.

While at the trial herein the Respondent attempted to change its position regarding its admission with respect to its gross revenues, Respondent failed to move to amend its answer. Under such circumstances, such defense—in addition to having no merit here—is waived. *Harco Trucking, LLC*, 344 NLRB No. 56 (2005). I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it has been a health care institution within the meaning of Section 2(14) of the Act. *Correctional Medical Services*, 325 NLRB No. 84 (1998) (not reported in Board volume).

II. SERVICE OF THE CHARGES

In its answer to the complaint, General Counsel's Exhibit 1(m), Respondent indicated as here pertinent as follows:

> 1. (a) The respondent Midwest Psychological Center, Inc. is without sufficient knowledge to admit or deny the allegations contained in case 25–CA–29381 filed by Yaina Williams.
>
> (b) The respondent Midwest Psychological Center, Inc. is without sufficient knowledge to admit or deny the allegations contained in case 25–CA–29405 filed by Hyun Kim.

The consolidated complaint alleges, as here pertinent, as follows:

> 1. (a) The charge in Case 25–CA–29381 was filed by Yaina Williams on October 26, 2004, and a copy was served by mail upon Respondent on October 26, 2004.
>
> (b) The charge in Case 25–CA–29405 was filed by Hyun Kim on November 16, 2004, and a copy was served by mail upon Respondent on November 17, 2004.

When called by counsel for General Counsel, Shelvy Keglar testified as follows:

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were covered by the payments, and, therefore, they were not admissible. Respondent's objections were overruled and General Counsel's Exhibits 3 through 7 were received.

[8] The CCA check, dated February 11, 2005, pays for invoices from the Respondent for $12,977.34 (dated November 1) and $11,755.75 (dated October 1).

[9] The CCA check, dated March 18, 2005, pays for invoices from the Respondent for $10,328.43 (dated January 31, 2005) and $10,266.99 (dated December 1).

[10] Respondent's attorney objected, apparently claiming that the Board was limited to 2004 since that is when the charge was filed. General Counsel's Exhibits 8 through 11 were received in evidence.

> Q. BY MS. BROWN: Dr. Keglar, you received copies of the Charges filed by Yaina Williams and Adrian Kim. Is that true?
>
> A. I received notice that they had filed a Complaint.
>
> Q. Did you receive copies of the Charges that they actually filed?
>
> A. I do not know if that is any different than what I received. I received a letter the Complaint had been filed. [Tr. pp. 114–116.]

Lori Ratti, who is a litigation support assistant with Region 25 of the National Labor Relations Board (Board), testified that one of her job duties is to mail out charges; that General Counsel's Exhibit 1(a) is a charge against Midwest Psychological Center filed by Williams in Case 25–CA–29381 on October 26; that General Counsel's Exhibit 1(b) is an Affidavit of Service she signed which indicates that the initial charge letter with enclosures in Case 25–CA–29381 was served on Midwest and Williams on October 26 by United States mail prepaid postage; that she never received any returned mail regarding Williams' charge; that General Counsel's Exhibit 1(c) is a charge against Midwest filed by Kim in Case 25–CA–29405 on November 16; that General Counsel's Exhibit 1(d) is an Affidavit of Service she signed which indicates that the initial charge letter with enclosures in Case 25–CA–29405 was served on Midwest and Kim on November 17, by United States mail prepaid postage; and that she never received any returned mail regarding Kim's charge.

Section 102.20 of the Board's Rules and Regulations, as here pertinent, specifies that

> All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Respondent's assertion that it is without sufficient knowledge to admit or deny the allegations contained in Case 25–CA–29381 filed by Williams and Case 25–CA–29405 filed by Kim is not responsive to the allegations in paragraphs 1(a) and (b) of the complaint. Each of these two paragraphs of the complaint contains two allegations, namely (1) a charge was filed, and (2) the charge was served by mail on the Respondent. While a respondent could assert that it is without sufficient knowledge to know when a charge is filed, such a response does not suffice with respect to whether the charge was served on the respondent. If a respondent does not specifically deny that a charge was served on it, then that allegation is admitted to be true. Also, a Board agent's signed and sworn affidavit, as to which there is no evidence disputing its authenticity, is sufficient by itself to establish service of the charge. *United States Service Industries*, 324 NLRB 834 (1997).

And finally, the following testimony was elicited by Respondent's attorney:

> Q. DR. KEGLAR . . . Were you served two Charges against you by Ms. Kim and Ms. Williams?
>
> A. Yes. [Tr. p. 403.]

In these circumstances, it has been shown that a copy of both of the involved charges was served upon the Respondent in a timely manner.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Witnesses Questioned by Counsel for General Counsel Pursuant to Federal Rule of Evidence 611(c)

Respondent has been in business since 1978. It provides mental health services, as here pertinent, at the Marion County Jail II and the Arrestee Processing Center (APC) pursuant to a contract with CCA. Shelvy Keglar, who is a psychologist, testified that he owns Respondent with his wife; that Respondent's contract with CCA covering the Marion County Jail II has been in effect since about May 2004, and its contract with CCA covering the APC has been in effect since September 2004; that he runs the day-to-day operations of Respondent, and is responsible for the discipline of employees, including the discharge of employees; and that Respondent has about 17 employees, including forensic case managers who interview (conduct mental health screenings) inmates who come into the involved facilities. In response to questions of Respondent's attorney, Shelvy Keglar testified that he is also the personnel director of Respondent.

Shelvy Keglar testified that although he did not interview her, he hired Williams after discussing the matter with Blanchard.

Shelvy Keglar testified as follows regarding Kim:

> She initially applied, for a full-time position with our Company, in another Department, and I discovered that she had *fraudulently misrepresented herself for the position she applied for*.
>
> So, I told the person who had interviewed her when I discovered that she did not have a Degree that she applied for the position, [sic] I looked at her resume and realized that she did not have the—she had applied for. It was an advertised position, for a Master's level person. She had gone through initial interview [sic] and a second interview. It is our procedure in that Department and no one had caught the fact that she did not have a Master's Degree.
>
> I took her resume home and I was reviewing her resume. I discovered that night, prior to her being made an offer, that she did not have a Master's Degree and I called my Coordinator of the Event Program at home and said, are you aware that this person cannot be hired because this position require[s] a Master's Degree. She said, oops, I had not seen that. . . . [Tr. pp. 79 and 80 and emphasis added.]

Shelvy Keglar testified that subsequently he hired Kim as a forensic case manager, which is a bachelor's level position.

Shelvy Keglar testified that Williams was discharged in October 2004, because "we did not feel that she was a satisfactory employee" (Tr. p. 70); that she was not satisfactory "primarily, she could not handle the job" (Tr. p. 71) in that Williams told her supervisor, Blanchard, that the job was too stressful; that another reason Williams was discharged was that she did not come to a staff meeting; that there was a suicide at the APC, and Williams could not handle the incident, her reaction

showed him that she was not the person for the job; that he did not speak with Williams about what happened regarding this suicide; that Williams had been employed by the Respondent about 2 to 3 weeks at the time of the suicide; that Williams was not disciplined as a result of what happened or for her reaction to the suicide; that Williams indicated in a document which she submitted to Blanchard, which document he saw, that she was too stressed and she was not able to come to work for her regular work shift; that Williams did not see the inmate who committed suicide because it did not happen on her shift; that Williams was not disciplined prior to her discharge; that he learned of Williams' reaction to the suicide from Blanchard; that no one else complained about Williams' reaction to the suicide; that he did not recall Blanchard ever complaining about the quantity or quality of William's work; that he did not think that when he decided to discharge Williams he was aware that she had complained about not being paid for attendance at mandatory staff meetings; that he did not recall Blanchard ever calling him and telling him that Williams was not being paid for attendance at staff meetings; that it looks like he gave an affidavit to the Board on November 29 and December 6, in which he indicated that both Williams and Kim had raised the issue of not being paid for going to staff meetings prior to their termination; that Respondent has a progressive discipline policy but no progressive discipline is needed before termination if someone is not satisfactory and they are jeopardizing Respondent's contract which is what Williams and Kim were doing; and that "We are not going to let anyone jeopardize our business, them or no one else, and that is exactly what happened." (Tr. pp. 98 and 99).

In response to questions of Respondent's attorney, Shelvy Keglar testified that Blanchard recommended that Williams be terminated; that Blanchard told him about Williams' statements about the suicide and Williams had "a lot of audacity to just tell us . . . [she was] not going to a meeting because she was too stressed. . . ." (Tr. p. 105); that no one ever filed a complaint with him about not getting paid; that Blanchard asked him if the staff was paid to come to a staff meeting that he set up, she was asked this question by employees, she told them that she did not know and she was going to check with him; that Blanchard had been with Respondent for about a month or 6 weeks at the time; that he was not sure if both Williams and Kim asked about being paid to attend mandatory staff meetings;[11] that Blanchard transferred the employees' hours onto a standard form, she faxed that form to him, he reviewed it, and the hours were transferred onto a payroll sheet by Respondent's payroll service; and that he paid Williams for what was on the timesheet sent to him by Blanchard.

Subsequently Shelvy Keglar testified that normally when he received timesheets with respect to the hours that Williams and Kim worked he expected them to reflect a total of 16 hours a week for each one; that he required the staff meetings and he discussed with Blanchard that the meetings would be held during the week, between Monday and Friday; that he knew Williams and Kim were weekend employees; that looking at the timesheets of Williams and Kim it would not have been obvious that they were not being paid for attending the mandatory staff meetings because people do not always work the times they are supposed to work; that the staff meetings were held once a week, every week; that the contract between Respondent and CCA called for two 8 hour part-time employees on the weekend (both working 8 hours on Saturday and 8 hours on Sunday); that if the Respondent paid Williams and Kim for attending the mandatory meetings it would have exceeded the agreed-upon number of part-time hours in Respondent's contract with CCA but this would not have been a problem because hours could be shifted from a vacant position; and that at the outset of the contract he projected giving the two part-time employees each 16 hours a week.

Blanchard testified that Williams was assigned to work at the APC; that she supervised this employee, who was a forensic case manager; that Williams assessed inmates, did follow-ups with inmates and was a cofacilitator with support groups; that she never gave a counseling or issued any written discipline to Williams; that she participated in the decision to discharge Williams; that she decided to discharge Williams because Williams became very upset, distraught about a suicide in the APC; that Williams telephoned her about the suicide, she was crying, extremely distressed, and she had to console Williams; that Williams wrote a letter indicating that she needed time off to deal with the matter; that when Williams was initially hired, she indicated during orientation that she was not sure that she could handle dealing with inmates; that she just told Williams to give herself some time; that Williams was upset that the involved arrestee was not referred to her before he committed suicide, telling her "I do not understand why they did not look for me" (Tr. p. 153); that she did not testify that Williams was upset because they, the nurse and correctional officers, did not come and get her but Williams was upset about the suicide; that Williams was concerned because they did not come and get her to assess the arrestee for the risk of suicide; that it is normal protocol for the nurse or correctional officer to refer the arrestee to Williams for risk assessment; that it was not inappropriate for Williams to telephone her with respect to the suicide; that when Williams telephoned her Williams said that there was a suicide at the APC and she did not know why they did not come and get her; that Williams started crying during the telephone conversation and she asked Williams if she wanted her to come to the APC to support her and help out; that Williams answered "no" (Tr. p. 158); that the suicide occurred during the night, the arrestee was discovered after hours, and Williams came in the next day and found out somebody had committed suicide; that she allowed Williams to keep seeing inmates after the suicide; that subsequently Williams submitted a written request to miss the next staff meeting; that Williams verbally advised her that she would probably want to take that whole week off to recuperate from all of that; that Williams saw inmates the weekend after the suicide; that the suicide occurred on October 9, and Williams worked on Sunday, October 10; that Williams worked the following weekend; that she counseled Williams about the incident subsequent to the day of the incident when Williams telephoned her to make sure that she had received William's

[11] Subsequently, in response to a leading question of Respondent's attorney, he testified that Williams was the only one who inquired about getting paid.

message about missing the staff meeting on Tuesday, October 12; that she counseled Williams on Tuesday by telephone; that she could not recall who contacted whom but she told Williams that it was very important that she receive the documentation; that the counseling consisted of her telling Williams that she hoped that Williams did not blame herself for the occurrence since she did not participate; that she asked Williams to write up what happened at APC regarding the suicide and show that she was excluded so Respondent would not be liable for what occurred since she was not included in the process; that she did not discipline Williams as a result of the suicide, Williams provided the documentation, and she told Williams that she had done a good job with the documentation; that the two reasons for Williams' discharge are her reaction to the suicide and what Williams said during orientation, as described above; that there was no other reason for the discharge; that shortly before she was terminated Williams contacted her by telephone and asked if she gets paid for staff meetings; that she told Williams that she did not know, she would have to ask, she would call Williams back, and she asked Williams for the telephone number so that she could call her back immediately; that she telephoned Shelvy Keglar who told her "yes," and then she telephoned Williams back and left a message on her voicemail saying that she would be paid for her staff meetings; that this occurred about 2 days before Williams was terminated; that the only other employee who was not being paid to attend mandatory staff meetings was Kim; that the fact that Williams' "took time off" (Tr. p. 184) was not one of the reasons that Williams was discharged; that she talked to Shelvy Keglar prior to discharging Williams in that they were discussing other matters regarding the jail and Williams' performance came up "and we had been discussing that, previously" (Tr. p. 172); that she had prepared written documentation about three times and gave it to Shelvy Keglar about her concerns regarding Williams' performance;[12] that Shelvy Keglar would have her typewritten notes; that she did not remember on what dates she made the notes; that she gave an affidavit to the Board, which she signed on December 15, in which she indicated that she did not keep her notes, and she did not mention the notes she allegedly gave to Shelvy Keglar; that in the affidavit she indicated that after she talked to Dr. Keglar about the issues, . . . she throws her notes away; that shortly before she was terminated Williams telephoned her to make an inquiry about not being paid for attending the mandatory staff meetings but Williams did not complain; that Williams and Kim were not paid for attending mandatory staff meetings; that she told Williams that she did not know about whether Williams should be paid for the staff meetings but she would get back to her; that Shelvy Keglar told her that Williams and Kim do get paid for staff meetings; that she left a voice message for Williams indicating that she does get paid for staff meetings; and that she changed the number of staff meetings Williams and Kim had to attend to two a month instead of the original four a month since they were part-time;[13] that Williams inquired but she did not complain about not getting paid for staff meetings; and that in her affidavit to the Board she indicated that Williams telephoned her "to complain about not being paid for staff meetings." (Tr. pp. 192 and 193.)

By letter dated October 18, General Counsel's Exhibit 16, Williams advised Blanchard as follows:

> I just received your message. I assumed that these decisions regarding compensation are not your responsibility, and this is the reason for the confusion and miscommunication. I made this assumption because I have been submitting my time sheets to you for staff meetings for the past few weeks, and you never told me that I would not be compensated for those hours. Therefore, I figured Shelvy, Jr. was probably making this determination, and I should contact him to *complain.*
>
> You stated that I will be paid for staff meetings, and now I am required to attend only two per month. I am assuming this means that I will be compensated retroactive for the three meetings I've already attended: two last month (9/20/04 & 9/28/04) and one this month (10/4/04). I will fax copies of the T3 forms previously submitted to you. If paying me for past meetings is a problem, please

[12] No attempt was made by Respondent to introduce such documents.

[13] Williams and Kim were part-time from day one of their employment with Respondent. Nothing changed in this regard. The change in the number of staff meetings they had to attend disclosed Respondent's true intention in that while Respondent was not paying Williams and Kim to attend mandatory staff meetings, they were required to attend one every week. Once Respondent realized that it could no longer get away with not paying Williams and Kim for attending the mandatory staff meetings, it was decided that it was only necessary for Williams and Kim to attend two mandatory staff meetings a month. Respondent did not indicate that the cost for the two part-time employees attending four staff meetings a month was considered in the contract terms for the two part-time employees. Indeed it appears that under the involved contract each of the two part-time employees was to work 16 hours a week. Shelvy Keglar knew that Respondent was not paying Williams and Kim each for more than the 16 hours every week. He also knew that (a) they were required to attend a staff meeting once a week and unless they took time off on the weekends this would result in their hours exceeding 16 hours a week or 32 hours during the pay period, and (b) that it would be easier to make up the difference in cost if, once he started to have to pay them for attending staff meetings, they only attended two staff meetings a month. It appears that Blanchard appreciated the situation in that after she testified about leaving a voice message for Williams telling her that she would be paid for the staff meetings, in response to questions of counsel for General Counsel, Blanchard testified as follows:

> Q. Did you change the number of staff meetings she was required to attend?
>
> A. Since she [Williams] is part-time, she only has to attend two staff meetings a month.
>
> Q. Prior to that [when Blanchard left the above-described voice message for Williams], how many was she required to attend?
>
> A. She—I think she attended only three staff meetings prior to that.
>
> Q. Yes, but that was not my question. Prior to that how many staff meetings was she required to attend?
>
> A. She—supposed to come to every staff meeting.
>
> Q. Okay and how often do those happen.
>
> A. Once a week.

As noted above, the witnesses were separated and Blanchard did not hear Shelvy Keglar's testimony.

> let me know *so that I can contact the Department of Labor for collection.* Since I have already attended one meeting this month, I will not be there today. [It has] been a rough week, and I need a break. I will attend next week's meeting, and I will present on November 9th if that's okay with you.
>
> Thank you for getting back to me, and I appreciate your apology (it's more than what I got from Shelvy, Jr.). By the way, I will not need Thanksgiving weekend off. My travel plans have been canceled. [Emphasis added.]

Blanchard testified that she received William's letter on October 19, she faxed it to Shelvy Keglar, and they discussed the letter after he received the fax; that later that day, after she and Shelvy Keglar discussed Williams' letter to Blanchard, the decision was made to discharge Williams; and that prior to Williams' discharge, she never told Williams that she considered Williams' work unsatisfactory.

General Counsel's Exhibit 12 is a letter dated October 19, from Blanchard to Williams which reads as follows:

> As of October 19, 2004, Midwest Psychological Center no longer will need your services. You will be paid for the previous 3 staff meeting[s] you had attended. Your APC electronic key, CMS swipe card, Marion County Sheriff Dept. badge, Conseco parking garage badge and any additional job-related items should be immediately returned to Midwest Psychological Center's office located at the above address.

Shelvy Keglar gave the following testimony:

> Q. Do you—did you—what part did you play, in it [William's termination letter] being prepared?
>
> A. I was carbon copied.
>
> Q. Did you instruct anyone to prepare this document, sir?
>
> A. I okayed it. I okayed her termination.
>
> Q. Okay and who did you instruct to—who did you okay the termination with, sir?
>
> A. Dr. Blanchard.
>
> . . . .
>
> Q. Okay, and you received a copy of this letter, sir?
>
> A. Right. [Tr. pp. 77 and 78.]

Blanchard testified that she prepared Williams' discharge letter, General Counsel's Exhibit 12, and copied it to Shelvy Keglar; and that she did not speak to Williams about her discharge prior to sending her discharge letter.

Subsequently Blanchard gave the following testimony:

> JUDGE WEST: With respect to General Counsel's Exhibits 12 and 13, I note that both documents indicate that Dr. Keglar was carbon copied.
>
> THE WITNESS: Was carbon copied?
>
> JUDGE WEST: cc, at the bottom.
>
> . . . .
>
> THE WITNESS: That is correct.
>
> JUDGE WEST: All right. Did you show Dr. Keglar both of these letters, before you mailed them?
>
> THE WITNESS: Yes, I did.
>
> JUDGE WEST: Okay. Did you discuss with Dr. Keglar the content of both of these letters?
>
> THE WITNESS: Before it was written.
>
> JUDGE WEST: Before it was written.
>
> THE WITNESS: Yes.
>
> JUDGE WEST: So, did he help, in drafting the letters?
>
> THE WITNESS: Basically, he told me what should be included and that is what I did. Then, I faxed it to me [sic], before mailing it.
>
> . . . .
>
> And got his okay. [Tr. pp. 211 and 212.]

Shelvy Keglar testified that Kim was discharged because "[h]er work was unsatisfactory" (Tr. p. 81); that Kim could not get the evaluations of the inmates done, she could not do enough work on the weekend, and there were a lot of complaints about her productivity and her not getting the work done; that Kim did not meet the standard of how many inmates to see during the day and she was referring inmates, who she should have seen, to other employees; that he did not know what the standard was; that Kim's write-ups were not written well in that she had information in the reports that did not need to be there; that it was not his role to counsel Kim with respect to the amount of work she was doing and he did not speak to her personally about the quality of her documentation; that Kim was discharged on the quantity and quality of her work; that he did not recall ever instructing that Kim be disciplined; that the first discipline Kim received was her discharge; that when he decided to discharge Kim he did not know that she had made complaints about having to attend weekly staff meetings; that he was not aware of any complaints about attending staff meetings; that he did not recall Blanchard ever calling him and telling him that Kim was not being paid for attendance at staff meetings; that, as indicated above, it looks like that he gave an affidavit to the Board on November 29 and December 6, 2004, in which he indicated that both Williams and Kim had raised the issue of not being paid for going to staff meetings prior to their termination; that, as indicated above, Respondent has a progressive discipline policy but no progressive discipline is needed before termination if someone is not satisfactory and they are jeopardizing Respondent's contract which is what Williams and Kim were doing; and that, as indicated above, "We are not going to let anyone jeopardize our business, them or no one else, and that is exactly what happened." (Tr. pp. 98 and 99.)

In response to questions of Respondent's attorney, Shelvy Keglar testified that Blanchard recommended that Kim be terminated; that it came to his attention that Kim was having a problem getting her work done on the weekends because she was writing excessively and taking too long; that "Blanchard had talked with . . . [Kim] about it several times, about her not getting it done, and that she needed to get it done" (Tr. p. 107); that, as indicated above, he was not sure if both Williams and Kim asked about being paid to attend mandatory staff meetings; that Blanchard spoke to him about Kim asking about flextime instead of pay; that flextime was for full-time employees (40 hours a week), and Kim was a part-time employee (16 hours a

week) who worked only on weekends; and that he paid Kim for what was on the timesheet sent to him by Blanchard.

On redirect by counsel for General Counsel, Shelvy Keglar testified that he did not recall Blanchard telling him that anyone but Williams raised the issue of not being paid for staff meetings, and Kim asked about flextime; and that in his affidavit to the Board he indicated

> Prior to her discharge, Yaina [Williams] had mistakenly—Yaina had been mistakenly told, by Dr. Blanchard, that staff meetings were not paid. I do not know when this conversation took place . . . but I [sic] was, before we decided to terminate both Yaina and Adrian. Dr. Blanchard told me that Yaina and Kim had raised the issue of not being paid for staffings with her. Dr. Blanchard told me she had told them both that they were not to be paid, for the time in staffing.
>
> I do not know for sure but my indication, from what Dr. Blanchard told me, was that both Adrian (Kim) and Yaina raised the issue at relatively the same time. I do not know it they raised this issue together with Dr. Blanchard or they discussed it separately with her. I told Dr. Blanchard that she was mistaken in what she told . . . them, that the staffings were supposed to be paid. I think that Dr. Blanchard's conversation with Yaina occurred, about a week or so prior to her discharge but I am not certain since I was not present for the conversation.
>
> I think that Dr. Blanchard told me, about this conversation the day—of her discussion with Yaina and Dr. Blanchard told me that she told them that staffings were not paid. I told Dr. Blanchard to pay Adrian and Yaina retroactively, for the staffings they had attended and to report their time spent, in staffings, in the future, so they could be paid.
>
> Yaina and Kim were only part-time employees and only week-end employees. So, they were the only people that had to come into the Jail, on off hours, for the staffings. These meetings occurred on all the other employees' normal work hours and they were paid, for their time in these meetings.
>
> Yaina's *complaint*, about not being paid for staffing was not a reason for her discharge. I did not consider how Yaina or Adrian's *complaint* about payments for staffing—I did not consider *complaints* about payment for staffings when I decided to terminate either of them. If they made the *complaint* about staffing jointly, I do not consider the fact they were *complaining* jointly when I decided to terminate Yaina or Adrian.
>
> We paid both Yaina and Adrian for . . . any staffings that they attended but were not initially paid for. [Tr. pp. 131–133 and emphasis added.]

Blanchard testified that Kim was assigned to work at Marion County Jail I; that she supervised this employee; that she participated in the decision to discharge Kim; that the only other employee, other than Williams, who was not being paid to attend mandatory staff meetings was Kim; that Kim was a forensic case manager who worked, like Williams, from 8 a.m. to 5 p.m. on Saturday and Sunday, working 16 hours a week; that Kim was discharged for poor performance in that she did not complete her work in a timely fashion, she worked over 8 hours a day to attempt to complete her work "due to lengthy write-ups or progress notes and third, she was not completing her work and—refer[red] it, to other workers to complete, which the other workers complained about" (Tr. p. 194); that Kim was not given formal discipline for not completing her work in a timely fashion, there were no written disciplines; that Kim did not receive a written discipline for working more than 8 hours or leaving work for others but Kim received verbals; that every time Kim worked she would work over 8 hours; that she told Kim that she could work beyond the 8 hours but she would not get comptime for it; and that Kim was never given any written discipline or suspended for her poor work performance.

In response to questions of Respondent's attorney, Blanchard testified that Kim never mentioned anything to her about compensation for attending staff meetings; that Kim only mentioned comptime (referred to by Blanchard as flextime) and she asked about it more than once.

General Counsel's Exhibit 13 is a letter dated October 21, from Blanchard to Kim which reads as follows:

> As of October 21, 2004, Midwest Psychological Center no longer will need your services. Your paycheck and a check for the 3 staff meetings you had attended are enclosed. Your APC electronic key, CMS swipe card, Marion County Sheriff Dept. badge, Conseco parking garage badge and any additional job-related items should be immediately returned to Midwest Psychological Center's office located at the above address.

Shelvy Keglar gave the following testimony:

> Q. Did you instruct that, that notice of termination (Kim's) be prepared, sir?
>
> A. I agreed with it.
>
> Q. Can Dr. Blanchard discharge an employee without your permission?
>
> A. No.
>
> Q. Okay. So, my question to you again is, did you instruct that this letter of termination be prepared?
>
> A. I concurred with it.
>
> JUDGE WEST: I am sorry. For the record, you concurred with it. Did you see the letter before it was mailed?
>
> THE WITNESS: Yes. [Tr. pp. 87 and 88.]

With respect to Kim's discharge letter, Blanchard testified that she made the decision to discharge Kim on October 21, 2004, the date of the discharge letter; and that she did not speak to Kim about her discharge prior to sending the discharge letter.

As noted above, subsequently Blanchard gave the following testimony:

> JUDGE WEST: With respect to General Counsel's Exhibits 12 and 13, I note that both documents indicate that Dr. Keglar was carbon copied.
>
> THE WITNESS: Was carbon copied?
>
> JUDGE WEST: cc, at the bottom.
>
> . . . .
>
> THE WITNESS: That is correct.

JUDGE WEST: All right. Did you show Dr. Keglar both of these letters, before you mailed them?

THE WITNESS: Yes, I did.

JUDGE WEST: Okay. Did you discuss with Dr. Keglar the content of both of these letters?

THE WITNESS: Before it was written.

JUDGE WEST: Before it was written.

THE WITNESS: Yes.

JUDGE WEST: So, did he help, in drafting the letters?

THE WITNESS: Basically, he told me what should be included and that is what I did. Then, I faxed it to me [sic], before mailing it.

. . . .

And got his okay. [Tr. pp. 211 and 212.]

B. General Counsel's Witnesses[14]

Kim testified that she worked for the Respondent as a forensic case manager from 8 a.m. to 5 p.m. on Saturdays and Sundays; that she reported her time by writing her hours on a time sheet; that in addition to the 8 hours she worked on both Saturday and Sunday, she was required to work every Tuesday in that she attended Respondent's staff meeting at the Marion County Jail; that as a forensic case manager she performed initial evaluations, took care of medical requests from inmates, and provided mental health service; that during the initial evaluation she asked the inmates why they requested to see a mental health professional; that she was assigned to see 12 to 13 inmates during a shift; that she entered the information she obtained during the interviews into a computer program; that she was paid biweekly for 32 hours (or 8 hours on two Saturdays and 8 hours on two Sundays); that she worked more than 32 hours twice during the entire time she worked for Respondent; and that the first time occurred after she had worked for Respondent 6 weeks and it involved her working a total of 5 hours more than her 32 hours during the biweekly period.

On cross-examination Kim testified that she found out about Respondent when she saw an ad in the Sunday newspaper for a case manager position at Marion County Jail; that the ad stated what was required for being a case manager; that she applied for the position but she did not get it; that she received a telephone call from Leesa Franklin, who was with Respondent, to see if she was interested in a home-based counselor position; that Franklin told her that she did not get the home-based counseling position because she did not have a master's degree in hand; that she did not ask what education the home-based counselor position called for and Franklin did not tell her; that she did not tell Franklin or anyone else at Respondent that she had a master's degree, and her resume showed everything about her educational credentials and her experience; that her resume indicated that she took master's degree courses and she had finished 33 credit hours out of 40 required for graduation but no where in her resume did she indicate that she had finished her master's program and got that degree; that no one at Respondent ever asked her what type of degree she had; that no one at Respondent described what the qualifications were for the home-based counselor position; that she was interviewed for the home-based counselor position but she was not offered the position; that Franklin told her that (a) Shelvy Keglar received her resume that she faxed to Respondent when she applied for the case manager position and sent it to Franklin who was hiring a home-based counselor, (b) when Franklin received the resume from Shelvy Keglar she assumed that Kim was qualified for the position, and (c) after she interviewed Kim she telephoned Shelvy Keglar who asked her if Kim had a master's degree in hand; that Franklin telephoned her that night and asked her if she had a master's degree in hand, and she told Franklin that as indicated on her resume, she had finished all of her course work but she had not done her thesis; that Franklin told her that Shelvy Keglar was willing to wait until she received her master's degree and Franklin offered her a part-time position at the jail; that the following morning she received a telephone call from Shelvy Keglar Jr. who wanted to proceed with the paperwork; and that she asked for a job description and accepted the position.

Williams started working for Midwest on September 13 as a case manager in the Marion County Jail, APC on Market Street in Indianapolis. Williams testified that she did mental status evaluations of the arrestees to determine if they were suicidal or would do harm to themselves and if they had a history of mental illness; that she filled out progress notes and she entered the information into the computer; that she worked on Saturdays and Sundays, and she was required to attend a staff meeting every Tuesday at the Marion County Jail; that she was not paid for attending the meetings; that Blanchard was her immediate supervisor; that Shelvy Keglar Jr., who hired her, is a manager with Midwest; that during her training, Blanchard asked her how she felt about working in this environment and she told Blanchard that she has never worked in this environment and it would probably be an adjustment; and that on a couple of occasions Blanchard told her that she was very good at what she did.

On September 20, after a staff meeting Kim showed her timesheet to Blanchard and explained that she went over the 32 hours by 5 hours because of some suicide cases, and Blanchard said it was okay. Kim testified that she initiated the conversation and prior to this Blanchard never talked to her about working more than 8 hours in a day; and that Blanchard told that in the future if she had to go over the 8 hours, she should keep it within 30 minutes or leave the paperwork behind for the weekday staff, and leave the job at 5 p.m.

On cross-examination Kim testified that she did not get authorization to work overtime; that Blanchard had told her that her shift was 8 hours, and she should leave the job at 5 p.m.; that on September 20, for the first time Blanchard told her that if she had to stay late to keep it within 30 minutes; that she did not get paid for the 37 hours and when she asked Blanchard about it Blanchard told her that she was going to be paid by comptime; that Blanchard explained that comptime is something she could use when she had to take a few hours or a day off; that Blanchard said comptime was the same thing as flextime; that at a staff meeting on September 28, Blanchard said that everybody was eligible for comptime and "everybody was supposed to write down every single day of work hours" (Tr. p.

[14] As noted above, counsel for General Counsel also called Ratti regarding the service of the involved charges.

264); and that Blanchard never specified that part-time employees were not eligible for flextime.[15]

According to Kim's testimony on cross-examination, on October 7, she spoke with Shelvy Jr. about her pay and he told her that he would speak with Blanchard; and that subsequently Shelvy Jr. left her a message indicating that her verified hours were 26.5 for a particular pay period, it was verified by Blanchard and if she had any further questions, she should speak with Blanchard. When Respondent's attorney asked Kim why she was not paid for 32 hours, she told him that she took Sunday, October 3, off because her baby had a birthday party.

On October 9, Kim saw Williams' timesheet on which Williams included her staff meeting time. Kim testified that she did not include her staff meeting time on her timesheet because the employee who trained her, Jordan Graves, told her she would not get paid for attending staff meetings;[16] and that prior to her discharge she was never paid for attending staff meetings.

Williams testified that on October 9 or 10, an inmate committed suicide around 3 or 4 p.m. while she was working; that at the time she was in the office at APC; that the inmate hung himself in a cell in the APC; that she saw CPR being administered to the inmate who committed suicide; that she telephoned Blanchard from her office at APC; that she had been instructed to telephone Blanchard in such a situation; that she told Blanchard that the arrestee who had committed suicide was not on her list of people to see; that the nurses did not include his name on the list of arrestees who needed mental status evaluation; that since he was not on the list, suicide precautions were not taken for him; that she asked the nurses why the arrestee was not placed on her list; that she was upset because a man had died on her watch, and she was not able to do her job because the nurses had not placed his name on her list; that she gave a memorandum to the nurses from their chief which explained the new procedure that they were supposed to refer anybody that they thought has suicidal tendencies to the Midwest case manager; that Blanchard told her that it was not her fault and she handled it well; that Blanchard told her to write a progress report, get everyone's name she talked to, and give all the particulars, including those of the suicide victim; that she wrote up the progress report; that Blanchard acknowledged receiving the progress report and said everything is fine; and that she did not cry during her conversation with Blanchard but her voice was quivering.

On October 12, after a staff meeting, according to the testimony of Kim, she told Blanchard that she accidentally saw another employee's timesheet and that new employee was including the staff meeting time on her timesheet. Kim testified that she asked Blanchard if she should be including her staff meeting hours on her timesheet and Blanchard told her that she "was right not to track down . . . [her] staff meeting hours because nobody gets paid for it." (Tr. p. 229.)

On cross-examination Kim testified that on October 12, she discussed with Blanchard getting paid for staff meetings.

On Saturday, October 16, Kim telephoned Williams and asked her if she was being paid for attending mandatory staff meetings. Kim testified that Williams checked her records while Kim was on the telephone and told Kim that "wait a minute, I am not getting paid for staff meetings that I was claiming" (Tr. p. 230); that she explained to Williams why she was not entering her staff meeting hours on her timesheet, namely Graves told her that she would not get paid for them; that Williams said that they had to get paid for the staff meetings and she was going to talk to Shelvy Keglar Jr.; that she told Williams that she, Kim, had a few extra hours that she worked, she spoke to Blanchard about it a couple of times and she, Kim, was afraid that if she kept pushing to get paid for the extra hours she would be fired; that she told Williams that she did not like confrontation and Williams said that she was comfortable with confrontation and Kim should let her handle it; and that Williams said that she was going to telephone Shelvy Jr. on Monday and also she was going to fax a letter to Shelvy Jr. to demand to get paid for the staff meeting hours.

Williams testified that she received a telephone call from Kim on October 16; that she was working when Kim telephoned her; that Kim told her that she was not being paid for some of her hours, for staff meetings and flextime; that she told Kim that they were being paid for staff meetings and she looked at her pay stub and discovered that she was not being paid for staff meetings; that she had been recording her staff meetings on her timesheet; that Kim told her that Blanchard said Kim would not be paid for staff meetings and Kim indicated to her that she had been trying to contact Shelvy Jr. but he was not returning her calls; that Kim told her that according to her husband, who is an attorney, it was illegal not to pay them for staff meeting hours; that she was directed to the Department of Labor website, she printed out the information, and she told Kim that she was going to relay the information to Shelvy Jr.; that later on October 16, she saw Blanchard and Kim at the Marion County Jail when she went there for a group therapy session; that Blanchard told her and Kim that they were not eligible for flextime as part-time workers; that she had never discussed flextime with Blanchard; that later that day she contacted Shelvy Jr. by telephone, and he told her that he could not hear her in that he was at a football game and he would call her back; and that he did not call her back.

After speaking with Williams, Kim began entering the time she spent at the staff meetings on her timesheet. On cross-examination Kim testified that she wrote down the time she spent at a staff meeting after October 16 on her timesheet but she was not paid for the time.

On Sunday, October 17, Kim spoke with Williams about not being paid for staff meetings. Kim testified that she told Williams that her husband was an attorney and he told her that under the State labor law part-time employees were supposed to be paid for every hour that they worked; that later that day, in the evening, Williams spoke with Kim's husband; and that she

[15] As indicated below, in an October 21 fax to Shelvy Keglar Jr., Kim indicated that on October 16, she was advised that nonsalary employees are not eligible for comptime.

[16] Graves was not shown to be a supervisor. The testimony was taken over the objection of Respondent's counsel because (a) the fact that Williams was not paid for her stafftime even though she included the stafftime on her timesheet was already a matter of record, and (b) it explained why Kim would not do that which is reasonable under the circumstances, namely enter all of the time she worked on her timesheet, including staff meeting time on Tuesdays.

heard her husband's side of the conversation, and he told Williams which website to go to collect relevant information about part-time employees and not getting paid for staff meetings.

On October 17, Williams faxed the following letter, General Counsel's Exhibit 18, to Shelvy Keglar Jr. at Midwest Psychological Center:

> I would have liked to discuss this in person; but as you know, we have been unable to meet, and you do not return my calls in a timely manner. It is probably better to put this in writing anyway, and I would prefer that you respond in writing. I need you to clarify something for me. Somehow I failed to notice that I have not been paid for the weekly staff meetings that I am required to attend on my day off. It was brought to my attention Saturday that not only am I not to be compensated for that time, but also there is no flex time available to part-time staff members. Correct me if I am wrong, but since the staff meetings are held on Tuesdays, isn't this hour considered flex time? I asked Dr. Blanchard to clarify the meaning of flex time, and she stated that it was any time beyond my weekly (weekend) 16 hours. Therefore, these staff meetings fall into the category of flex time if I follow this logic. With this logic, I can further presume that any staff meeting held outside my normal weekend hours is not required. But, I have been told that these meetings are mandatory.
>
> Needless to say, I am very upset about this mater. First of all, you never informed me about this. I have been submitting my time sheets for these staff meetings, and no one has bothered to say anything to me for weeks. I find this to be extremely unprofessional. Second, I have no problem with attending staff meetings, as I understand this is part of my duties, and I take pride in performing my duties in a professional and irreproachable manner. I also enjoy meeting with the other workers. However, I do not like feeling as if you are taking advantage of me; and when you expect me to perform my duties for free on my day off, then that is totally unacceptable.
>
> I would like to resolve this matter amicably. I enjoy my job because I am gaining valuable experience that will help me finish my degree, and I like and respect my coworkers. I do not intend to quit. But, I also do not intend to continue attending staff meetings or performing any other duties on my days off for free. You cannot require me to do flex time and forbid it at the same time. You cannot fairly have it both ways. It would be fair to choose one; either pay me for the hour on Tuesdays or excuse me from these weekly staff meetings without penalty. This seems to be a simple and fair solution in my mind. I hope that you will agree, or perhaps there is some way you can clarify this matter to make it make sense for me because I am confident that it is not your intention to be unfair or to violate any labor laws.

The following is a quote from the Department of Labor website regarding compensatory work hours:

> Lectures, Meetings, and Training Programs: Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

I acquired this statement from the Department of Labor website: . . .

> Our staff meetings do not meet the four criteria listed in the above statement because we are required to attend, they are not outside normal business hours, and they are obviously job related. Therefore, according to the law, you either have to pay me for those hours or make the meetings voluntary. Until I hear from you, or I receive a check compensating me for the past four staff meetings, I will not attend any more staff meetings on my day off. Just a thought: perhaps another solution would be to encourage Dr. Blanchard to schedule our meetings on the weekends during my shift. That way you can pay the full time workers who are eligible for flex time compensation.

General Counsel's Exhibit 19, which reads as follows, was faxed by Williams to Shelvy Keglar Jr. immediately after General Counsel's Exhibit 18:

> Listed under 'Frequently Asked Questions,' here is another direct quote form [sic] the Indiana [D]epartment of Labor website for reference:
>
> . . . .
>
> Does my employer have to pay me for mandatory meetings?
>
> Yes. An employer must compensate employees for time spent on the job when the employee is subject to the employer's control and direction.

On October 18, Shelvy Keglar Jr. telephoned Williams, left a message, and she called him back. Williams testified that she asked Shelvy Keglar Jr. if he had received her letter and laughing she asked if she was fired; that Shelvy Keglar Jr. did not laugh, his tone changed, his voice lowered, and the timber in his voice lowered, he sounded very serious and angry; that Shelvy Keglar Jr. said "I do not know why you sent me this letter. You should have called. We should have talked about this face-to-face. Why did you send me this letter" (Tr. p. 323); that she told him that he did not return her calls and when they tried to meet he did not show up; that he told her she should have talked with Blanchard and she would have talked to him; that he said "Adrian's issue is different from yours," (Tr. p. 323) and she said "I do not know how because neither one of us are being paid for staff meetings, but that is beside the point because I am not concerned about flex hours . . . . I do not even really understand what that means" (Id.); that she told him that she was just concerned with getting paid for staff meetings; that he told her that she was right as far as being paid for staff meetings and she should call Blanchard; that she called Blanchard and asked her why she was not being paid for staff meetings; that Blanchard told her that no one is paid for staff meetings; that she told Blanchard that Shelvy Keglar Jr. just told her that she should be paid for staff meetings; that Blanchard told her to call Shelvy Keglar Jr. and she told Blanchard that she should call him and get back to her; and that later that afternoon Blanchard called her back and left a message indicating that she would be paid for staff meetings and from now on she only had

to attend two a month and it was up to her which two she would attend. On cross-examination Williams testified that Blanchard had all of her telephone numbers and she just told Blanchard to call her back.

On Monday, October 18, Kim spoke with Williams by telephone. Kim testified that Williams telephoned her at home; that Williams said that she faxed a letter to Shelvy Keglar Jr. to demand to get paid for staff meeting hours, and Shelvy Jr. telephoned her and they discussed Williams not getting paid for staff meeting hours; and that during Williams' telephone conversation with Shelvy Jr. he told Williams that Kim's issues are totally different and Williams told Shelvy Jr.

> she did not know what was going on with Adrian. Anything about Adrian's issue, you will have to directly talk to her. I do not know what is going on with her. So do not mention her name to me. I just want to talk, about my staff meeting hours that I did not get paid (transcript pages 236 and 237).

Kim further testified that later that night she received another telephone call from Williams who told her that she received a voicemail message from Blanchard; and that Blanchard advised Williams in the message that she would be paid for staff meetings, and from now on she would only have to attend two staff meetings a month instead of attending every week.

On October 18, Williams sent Blanchard a letter, General Counsel's Exhibit 16, after she received Blanchard's message. The letter, which is set forth above, bares repeating here. It reads as follows:

> I just received your message. I assumed that these decisions regarding compensation are not your responsibility, and this is the reason for the confusion and miscommunication. I made this assumption because I have been submitting my time sheets to you for staff meetings for the past few weeks, and you never told me that I wound not be compensated for those hours. Therefore, I figured Shelvy, Jr. was probably making this determination, and I should contact him to *complain*.
>
> You stated that I will be paid for staff meetings, and now I am required to attend only two per month. I am assuming this means that I will be compensated retroactive for the three meetings I've already attended: two last month (9/20/04 & 9/28/04) and one this month (10/4/04). I will fax copies of the T3 forms previously submitted to you. If paying me for past meetings is a problem, please let me know *so that I can contact the Department of Labor for collection.* Since I have already attended one meeting this month, I will not be there today. [It has] . . . been a rough week, and I need a break. I will attend next week's meeting, and I will present on November 9th if that's okay with you.
>
> Thank you for getting back to me, and I appreciate your apology (it's more that what I got from Shelvy, Jr.). By the way, I will not need Thanksgiving weekend off. My travel plans have been canceled. [Emphasis added.]

Williams testified that she never received a reply to this letter. And as noted above, Blanchard testified that the decision was made to discharge Williams that day after she and Shelvy Keglar discussed this letter from Williams.

On Tuesday, October 19, Kim spoke with Blanchard and Williams. Kim testified that she telephoned Blanchard before the staff meeting and told her that she could not attend the staff meeting because her baby was sick; that Blanchard, who had a young child, said that she understood and she gave her some advice on what to do about Kim's baby running a fever after receiving a vaccine; that Blanchard told her that "from now on you are going to get paid for your staff meeting hours but you do not have to attend it every week. As long as you attend a staff meeting twice a month you will be alright" (Tr. p. 238); and that Blanchard told her not to worry about the staff meeting today, she already attended last week's staff meeting, she should not worry and Blanchard would see her next week.

Later Kim received a telephone call at home from Williams. Kim testified that Williams told her that she just got fired; that Williams telephoned her again later that day and told her that she had talked with (1) Shelby Jr. who told her that he did not fire her, Blanchard did, and (2) Blanchard, who told Williams that she did not have to give a reason why Williams was discharged; and that she told Williams that she would be next to be fired because she was going to fax a letter to Shelvy Jr. to demand to get paid for staff meetings and she was going to push getting paid for the extra hours she worked.

Williams testified that on October 21, she telephoned Keith Boyd, an employee at Midwest who worked at the APC, to find out if he wanted to have lunch after the staff meeting on October 26; that Boyd told her that during the staff meeting on October 19, Blanchard stated that Williams was no longer working at Midwest; that she telephoned Shelvy Jr. and asked him if she was fired; that Shelvy Jr. would not answer her but rather said he did not know; that Shelvy Jr. started reading a letter he said Blanchard showed him and the letter was her, Williams', termination letter; that he told her to call Blanchard; that when Blanchard returned her call she asked her why she was fired; that Blanchard referred to the letter and she told Blanchard that she did not get the letter; that Blanchard asked her how she knew that she was fired and when she told Blanchard that someone told her Blanchard wanted to know who; that she asked Blanchard if she was fired because she demanded to be paid for the staff meetings and Blanchard said something about her probationary period; that she told Blanchard that if she was not going to answer her question then there was nothing more to say and she ended the conversation; that she received a termination letter later that day; that she was never given a reason for her discharge; that she was never disciplined while she worked for Midwest; that the only thing she received from Blanchard was encouraging feedback; that she never took a Saturday or Sunday off while she worked at Midwest; that she never told Blanchard that she was too stressed to come to work; and that she did not attend a staff meeting. On cross-examination Williams testified that Blanchard told her to co-facilitate group therapy sessions and she was concerned because she was not prepared for that and she needed more training.

On Thursday, October 21, at 10 a.m., Kim faxed, as here pertinent, the following letter, General Counsel's Exhibit 17, to Shelvy Keglar Jr.

> . . . .
>
> I request your assistance . . . in clarifying and resolving some outstanding Human Resource and Payroll issues. Enclosed please find a copy of the Time Sheets that reflect the paycheck periods that are referred to in this letter. . . .
>
> When I asked my supervisor Dr. Blanchard if I may exceed eight (8) hours in a day when the workload required additional effort, she stated 'Yes, but try to stay no more than an extra thirty (30) minutes per day—and only when necessary.' She continued that I would not be paid at an overtime rate or automatically receive payment for these additional periods on the next paycheck, but that I would accrue, in essence, Comp' Time, and be able to take that Comp' Time when I need to take time off for personal matters. Later, when I took a personal day, and my next check did not include credit for my accrued Comp' Time, I asked Dr. Blanchard about this, and she stated that Comp' Time is not automatically applied. Then, at the following week's staff meeting, I was told that the appropriate form for Comp' Time was not yet available. Then, on October 16, 2004, I was told that nonsalary employees are not eligible for Comp' Time.
>
> . . . .
>
> On October 19, 2004, I was told that nonsalary employees would be paid for time spent attending staff meetings. I applaud you for coming into compliance with both Indiana and Federal law on this issue. Now, I ask you to come into compliance with both Indiana and Federal law regarding remuneration of nonsalary employees for hours worked. . . .
>
> . . . .
>
> My records indicate that I have not been paid for the following periods spent on the job, subject to my employer's control and direction:
>
> 1. For the pay period ending September 19, 2004, I worked thirty-seven (37) hours, but was only paid for thirty-two (32) hours.
>
> 2. For the pay period ending September 26, 2004, I worked twenty-six and one-half (26.5) hours, but was only paid for twenty-four (24) hours.
>
> 3. I have not been paid for time spent attending staff meetings on: 9/20/04, 9/28/04, and [1]0/12/04.
>
> *If Midwest is unable or unwilling to pay me for these periods within fourteen (14) days of receiving this letter, then please respond to me in writing with an explanation as to why.*
>
> Again, I truly appreciate the opportunity to work at Midwest Psychological Center and find the service side of the business deeply rewarding. I know that you are a reasonable man and, as such, I believe that you would be unhappy if you were not paid for hours that you had worked . . . . [Emphasis added.]

Kim testified that she sent the letter because she wanted to get paid for the hours that she actually worked and for the staff meetings she attended but did not get paid for attending.

On cross-examination Kim testified that she was not paid for all the hours she worked in the September 6–19 pay period, and the pay period including October 2.

On Friday, October 22, Kim received a letter of termination. The letter, which is set forth above, is dated October 21. Kim testified that she had two discussions with Blanchard about the number of patients she was seeing in a day; that she initiated both of these discussions; that the first occurred on September 20, after a staff meeting, and she told Blanchard that she was trying hard to finish her interviewing of patients and doing the paperwork; that Blanchard told her not to worry about it, she understood, and she told her to write it down on the paper chart as concisely as she could or it would be tons of paperwork; that she also initiated the second conversation, which took place on the Saturday they started group therapy for inmates at the jail; that she explained to Blanchard that there would be 10 people present for group therapy and after the group therapy session she would have to do the paperwork for these 10 plus the paperwork for 12 to 14 inmates she saw on a Saturday; that she told Blanchard that she did not know how she would handle all this paperwork; that Blanchard told her that if she could not finish everything by 5 p.m., just leave it for the weekday staff to take care of; that she and Williams facilitated the group therapy sessions and Blanchard was present that Saturday to supervise the first session and give her and Williams instructions on how to run the group; that more than once she asked Blanchard in a memorandum if she should change anything in her progress notes and Blanchard did not reply to the memorandums; and that she was never disciplined while she worked for Respondent, she was never told that Respondent was dissatisfied with the number of patients she saw, and she was never told that Respondent was unhappy with her notes on patient interviews.

On cross-examination Kim testified that she did not have a problem performing her duties in an 8-hour shift; that she did work beyond 8 hours on occasion when around 5 p.m. she was getting ready to leave and a suicide case was reported; that she had to call and page Dr. Gashaw, the psychiatrist or Dr. Blanchard right away and she was at the jail until almost 7 p.m.; that she had to do this a couple of times; that suicide cases do not need authorization to work overtime in that it is an emergency and a determination has to be made as to whether the inmate should be transferred to a suicide cellblock; that she only worked beyond 5 p.m. two times; that once she took a day off for her baby's first birthday; and that Blanchard never spoke to her about her performance or leaving work for other employees.

On redirect Kim testified that she had instructions to follow regarding a suicidal inmate; that she telephoned Blanchard first and then Gashaw; that the first suicidal situation came up in her second week with Respondent; that when she telephoned Blanchard about the first suicidal inmate Blanchard told her to have the person transferred to the suicidal block and Blanchard faxed the paperwork for the transfer; that it was understood that she was to stay until the transfer was completed; that Blanchard

gave her permission to take a day off, saying "it is your baby's first birthday. It is important. You got to be there" (Tr. p. 293); and that Blanchard did not discipline her for taking the day off.

C. Respondent's Witnesses

Blanchard testified that the only conversation she had with Williams about her duties occurred the day Williams reported the suicide; that she told Williams that she would come to APC and support her and assist her on the job; that Williams refused her offer; that Williams was very distraught, and very emotional; that as a mental health professional you have to deal with those kinds of issues and be able to handle it in a professional manner and it was overwhelming to her; that she discussed this situation with Shelvy Keglar on two or three occasions; that Williams sent her a fax requesting possible time off because of this incident and additional events that have occurred, namely Williams had a brother who was in the hospital during this time; that as a supervisor she is required to give an evaluation to a probationary employee like Williams after 6 months; that she could do an evaluation prior to the end of the 6-month period; that she not did think Williams had the ability or the competency to handle the position; that she brought this to Shelvy Keglar's attention at the time; that Williams never told her that she was not supposed to be a cofacilitator at group therapy sessions; and that on October 18 Williams gave her a telephone number where she could be reached.

On cross-examination Blanchard testified that Williams requesting some possible time off had nothing to do with her decision to discharge Williams; that Williams was fired because of (1) her competency, namely her reaction to the suicide, (2) her comment when she first began working at APC, and (3) Williams telling her that she had only done a support group once during her training; that with respect to the support group, she told Williams that it was part of her job requirement and she would always have a master's level person to assist her with the group; that she did not testify earlier, in response to a question of Respondent's attorney, that Williams did not talk to her about the group meeting; and that when she testified in response to counsel for General Counsel's Rule 611 (c) questions she testified that Williams was terminated because of (1) her reaction to the suicide and (2) the comment she made about inmates.

Subsequently Blanchard testified that it would not be uncommon for someone who had never been in a situation like it to express concern when they first were in the APC; and that she did not recall seeing on Williams' timesheets which were submitted to her the 1 hour (2 hours a pay period) for attending a mandatory staff meeting.[17]

Regarding Kim, Blanchard testified that Kim never brought to her attention the fact that she did not get paid for a staff meeting; that Kim complained to her about flextime and on several occasions she told Kim that she was not eligible; and that she recommended Kim be terminated for poor job performance.

Leesa Elaine Carter-Franklin, who is a program coordinator for home-based counseling and also a family therapist at Midwest, testified that she interviewed Kim for a family therapist position Kim applied for; that "[r]eviewing her resume and speaking with her on the phone, she had indicated and led me to believe that she had her masters, which is why we granted the interview" (Tr. p. 400); and that she did share Kim's resume with Shelvy Keglar for his review and a possible position he had available in another program. On cross-examination Franklin testified that Kim told her "I am really close to a Masters, I will have it soon" (Tr. p. 401); that Kim made this statement *during her interview* with her; that over the telephone before the interview Kim told her that she did have her masters; and that what occurred did not disqualify Kim from being considered for another position. On redirect Franklin gave the following testimony:

> Q. BY MR. HAWKINS: Okay. She told a falsehood then. She stated she had a Masters and she did not.
>
> A. Correct, sir.
>
> Q. You only found out *after the interview*. Is that correct?
>
> A. Correct, sir. [Tr. p. 402 and emphasis added.]

Shelvy Keglar testified that Blanchard brought to his attention that Kim had a concern about flextime but not about pay for attending staff meetings; that Williams never filed a complaint with him prior to filing a charge with the Board; and that

> I took her [Kim's] resume home. I was looking over her resume, as I do all . . . candidates.
>
> I called Leesa Franklin and said are you aware that she does not have a Master's Degree and Leesa said no I am not. She [Kim] had presented herself all the way through the interviews as having a Master's and told Leesa she did. I deciphered, in looking at her resume, that she did not have a Master's and told Leesa, you cannot hire her for that position. So that is how she [Kim] came to our Company.
>
> She [Kim] did not apply for the jail position. She applied for a Family Therapist position. It was advertised as a Master's level position and she [sic] Leesa she had a Master's and came to the interview, as Leesa testified. [Tr. pp. 416 and 417.]

Shelvy Keglar further testified that Blanchard repeatedly talked to him about Kim not getting her work done on weekends; that he looked at Kim's work and she was writing excessively and that is why she was not getting her work done; that he told

[17] The reason that Blanchard refused to concede that she saw the entries on Williams' timesheets submitted to Blanchard for the staff meetings is that this would raise the question of why didn't she tell Williams that Respondent did not pay her and Kim for staff meetings. Her explanation to Williams and Kim that nobody gets paid for staff meetings was not true. Since the meetings were held during the week and not on weekends, full-time employees were paid for attending them since they occurred during those employees' workday. Blanchard appreciated that fact that Williams and Kim were to be paid for a maximum of 32 hours each for each pay period. From the outset, both Blanchard and Shelvy Keglar knew that Williams and Kim were not being paid for attending mandatory staff meetings. When these two employees took a stand on this issue, they were terminated.

Blanchard that Kim had to get her work done in accordance with what the expectations were; that Kim "did not change her way of doing it. It consistently kept going over" (Tr. p. 417); and that Blanchard sent him informal notes and when it continued to happen he decided not to keep Kim on.

Subsequently Shelvy Keglar testified that some people would not be able to conclude that Kim did not have her master's degree just by looking at her resume but he was able to reach this conclusion based on looking at her resume alone; and that Kim indicated on her resume that she had not completed her thesis and this indicated to him that she did not have her master's degree.

On redirect Shelvy Keglar testified that it was inexcusable that Kim took a day off for her baby's first birthday; and that

> I do not tolerate anybody, especially working the first month of a Contract, taking off excessively, not doing the job and not changing when you ask them, to do the job, and that is with Kim. She did not change after we asked her to change and—another person who is not suitable [sic] job. [Tr. p. 428.]

On further recross Shelvy Keglar testified that he did not say anything about Kim asking for a day off as a reason for his deciding to discharge her when he first testified as a 611(c) witness; that he "did not mention it, that is true, and because I did not think about and it came to me later. That was an issue with her" (Tr. p. 429); that no one approved Kim taking a day off; that Respondent has a vacation form; that he did not know if Kim made a request to take the day off; and that when Williams indicated that she was stressed and might have to take some time off it would be a workday.

ANALYSIS

Paragraph 5 of the complaint alleges that Respondent discharged Williams and Kim because they concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by requesting that employees be paid for attending mandatory meetings and that employees be compensated for the actual hours worked.

Blanchard knew from the outset that Midwest was going to try getting around paying Williams and Kim for attending mandatory staff meetings on their day off. The contract Midwest had with CCA called for each of two part-time employees to work 8 hours on Saturday and 8 hours on Sunday. When Williams and Kim asked Blanchard about not being paid for the staff meetings, Blanchard told both of them the same lie, namely that nobody gets paid for attending staff meetings. Blanchard admitted when she testified as a 611(c) witness that the only two employees who were not paid for attending mandatory staff meetings were Kim and Williams. As noted above, when Respondent could no longer get away with not paying Williams and Kim for attending these weekly meetings, Respondent informed them that they only had to attend two a month. Shelvy Keglar knew exactly what was going on from the outset. He unwittingly disclosed his true intention when he reduced the hours immediately upon realizing that he was going to have to pay Williams and Kim. If he intended to pay them from the outset, they would not have been attending weekly (as opposed to two a month) staff meetings from the outset.

The timing of the discharges is also revealing. The various justifications asserted by Respondent, from a chronological standpoint, must be viewed in terms of the fact that nothing was done about these alleged shortcomings until Williams and Kim spoke to supervisors, and submitted documentation to Respondent demanding to be paid for the hours they worked. Williams' above-described letter indicating that she was willing to contact the Department of Labor to collect the money owed her was received by the Respondent on October 19, it was discussed by Blanchard and Shelvy Keglar, and later that same day the decision was made to discharge Williams. At 10 a.m. on October 21, Kim faxed her demand to be paid for the hours worked letter to Respondent, and by letter dated October 21, Kim was discharged. Action was taken by Respondent on the same day both demanded to be paid for the hours worked letters were received. Both employees were discharged the same day Respondent received their demand letters. There is no subtlety here.

Under Section 7 of the Act "[e]mployees shall have the right to . . . engage in . . . concerted activities for . . . mutual aid or protection. . . ." Here the involved activity was undertaken by Kim and Williams. They discussed not being paid for hours worked. They discussed their course of action. Both asked to be paid for the hours they worked. Both communicated their demand to Respondent's supervisors, and Respondent was aware of their demands before it terminated them. Kim and Williams were involved in concerted protected activity, and the Respondent discharged them for their activities

Respondent did not even attempt to introduce a single exhibit. And none of its three witnesses were credible.[18] They contradicted each other, some of Blanchard's and Shelvy Keglar's testimony was contradicted by their affidavits, and Blanchard and Shelvy Keglar changed their testimony as they saw fit.

Shelvy Keglar is not a credible witness. He lied under oath about Kim's credentials. Shelvy Keglar testified that Kim fraudulently misrepresented herself when she applied for a position with Respondent, and that he was the one who discovered the misrepresentation. It is not quite clear why, if he believed that she fraudulently misrepresented herself when she applied for a position with Respondent, he hired her after making this discovery. His testimony is contradicted by Franklin who testified at one point that Kim told her during her interview that she did not have her master's. In response to a leading questions from Respondent's attorney, Franklin later testified "[c]orrect . . . [c]orrect" that Kim told a falsehood, she stated that she had a master's and she did not . . . [and Franklin] only found out *after* the interview." (Emphasis added.) It is also not clear why, if Kim lied about having her master's to Franklin over the telephone to get the interview, according to Franklin, Kim was not disqualified from being considered for

[18] It should be noted that as pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 751 (2d Cir. 1950); "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

another position.[19] Shelvy Keglar testified that after the aforementioned suicide, Williams was not able to work her regular shift. Blanchard testified that Williams requested to miss a staff meeting not her regular shift. Williams was able to work her regular shift. Shelvy Keglar testified that one of the reasons Williams was discharged was because she did not come to a staff meeting. Blanchard, who allegedly participated in the decision to discharge Williams, testified that the fact that Williams took time off was not one of the reasons for her discharge. Shelvy Keglar never explained why, if Williams' reaction to the October 9 suicide was so inappropriate, Respondent let her work October 10, and Saturday and Sunday of the following weekend, and only discharged Williams after Respondent received her demand to be paid for the hours worked letter. Shelvy Keglar was not candid about the role he played in the preparation of the two discharge letters. Blanchard testified that basically Shelvy Keglar told her what should be included in the letters and that is what she did. Shelvy Keglar when called by Respondent added as a reason for Kim's discharge the fact that she took her baby's first birthday off from work. Blanchard, who supposedly participated in the decision to terminate Kim, did not deny that she approved Kim taking time off from work to celebrate her baby's first birthday. Shelvy Keglar initially testified that that he did not think that when he decided to discharge Williams he was aware that she had complained about not being paid for attendance at mandatory staff meetings; that he did not recall Blanchard ever calling him and telling him that Williams was not being paid for attendance at staff meetings; and that when he discharged Kim he did not know that she had made complaints about having to attend weekly staff meetings. Subsequently he testified that it looks like he gave an affidavit to the Board on November 29 and December 6, in which he indicated that both Williams and Kim had raised the issue of not being paid for going to staff meetings prior to their termination.

Blanchard is not a credible witness. In addition to the credibility issues described above, Blanchard added a reason for Williams' discharge when she was called by Respondent. This required not only that she change the testimony she gave when she was initially called as a 611(c) witness but it required that she deny that she testified earlier on direct when called by Respondent that Williams never told her that she was not supposed to be a cofacilitator at group therapy sessions. Blanchard testified that Williams inquired but she did not complain about not getting paid for staff meetings. In her affidavit to the Board, however, Blanchard indicated that Williams complained about not being paid for staff meetings. Blanchard refused to admit the obvious with respect to William's time sheet, namely that she saw that Williams was including 2 hours per pay period for attending staff meetings. For the involved pay periods Blanchard took Williams' hours off the timesheet Williams filled out and Blanchard entered those hours on a timesheet she forwarded to Respondent's main office. For the involved pay periods Blanchard did not include the hours for staff meetings on the timesheet she forwarded to Respondent's main office. For the involved pay periods Blanchard did not tell Williams that she was wasting her time entering her staff hours because Blanchard was not going to include them on the timesheet she forwarded to Respondent's main office, and Respondent was not going to pay her for that time. Blanchard lied when she told Williams and Kim that no one was paid for attending staff meetings. Blanchard lied under oath when she would not admit that she saw the hours for staff meetings on Williams' timesheet. Blanchard's testimony that Kim never brought to her attention the fact that she did not get paid for staff meetings is not credited. Kim's testimony in this regard is credited.

With respect to Respondent's alleged justifications for the discharges of Kim and Williams, Respondent relies on no documentation whatsoever and calls two witnesses who are not credible.[20] The credible evidence of record demonstrates that the alleged justifications asserted by Respondent are nothing more than afterthought fabrications.

Williams and Kim are credible witnesses. Their testimony is credited. Respondent violated the Act as alleged in paragraph 5 of the complaint.

CONCLUSION OF LAW

By discharging Yaina Williams and Hyun Kim because they concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by requesting that employees be paid for attending mandatory meetings and that employees be compensated for the actual hours worked, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will be required to expunge from its records any reference to the unlawful discharges of Yaina Williams and Hyun Kim.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

[19] Kim is a credible witness. Her testimony regarding what happened during her interview process in seeking employment with Respondent is credited. Franklin's account was a poorly assembled fabrication. Franklin was not a credible witness.

[20] Kim was hired after Franklin interviewed her. Franklin's testimony does not credibly refer to Kim's discharge.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Midwest Psychological Center, Inc., of Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because they concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by requesting that employees be paid for attending mandatory meetings and that employees be compensated for the actual hours worked.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Yaina Williams and Hyun Kim full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Yaina Williams and Hyun Kim whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 19, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for concertedly complaining to us regarding your wages, hours, and working conditions, by requesting that you be paid for attending mandatory meetings and that you be compensated for the actual hours worked.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Yaina Williams and Hyun Kim full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Yaina Williams and Hyun Kim whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Yaina Williams and Hyun Kim, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MIDWEST PSYCHOLOGICAL CENTER, INC.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."